

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )

Amendment of Part 90 of the )  
Commission's Rules to Provide )  
for the Use of the 220-222 MHz Band )  
by the Private Land Mobile )  
Radio Service )

PR Docket No. 89-552

Implementation of Sections 3(n) and 332 )  
of the Communications Act )

GN Docket No. 93-252

Regulatory Treatment of Mobile Services )

Implementation of Section 309(j) of the )  
Communications Act-Competitive )  
Bidding, 220-222 MHz )

PP Docket No. 93-253

To: The Commission

COMMENTS OF SMR ADVISORY GROUP, L.C.

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## **SUMMARY**

As a manager of approximately eighty-five (85) constructed Phase I 220 MHz systems and a likely participant in the upcoming auction of Phase II 220 MHz licenses, SMR Advisory Group, L.C. ("SMR Advisory") vigorously supports the Commission's initiative to allow partitioning and disaggregation in the 220 MHz service. Each of these vehicles will serve several articulated goals of the Commission, including facilitating entry into the market by new players and expediting the provision of 220 MHz service to more remote areas. In addition, partitioning and disaggregation will provide 220 MHz licensees with additional flexibility to tailor and implement their business strategies as the industry proceeds to auction all Phase II licensees in the 220 MHz service.

SMR Advisory urges the Commission to extend full partitioning and disaggregation rights to all Phase I licensees. Although the geographic areas and frequency allotments relating to Phase I licensees generally are smaller than those associated with Phase II licenses, there is no compelling reason to deprive Phase I licensees of the benefits to be derived from partitioning and disaggregation. Equally important, the public interest benefits of partitioning and disaggregation can be obtained from Phase I licensees as well as Phase II licensees, particularly as Phase I licensees consolidate their license holdings to form networks of 220 MHz systems.

With regard to specific issues raised by the Commission, SMR Advisory supports the Commission's proposal to permit parties to define their own partitioned areas, rather than to require that such boundaries be defined along geopolitical lines. This approach permits the parties to define service areas that are more reflective of market realities and best encourages partitioning in the marketplace. SMR Advisory opposes the imposition of minimum or maximum disaggregation standards; the marketplace will impose its own pressures against

disaggregation that is not warranted. Combining partitioning and disaggregation also is important to the parties' ability to tailor their systems to market demands; SMR Advisory supports, therefore, the Commission's proposal to permit such combinations.

As for the various construction, licensing and payment obligations and entitlements for partitionees and disaggregatees, SMR Advisory believes the most appropriate course will ensure that any such rights and obligations flow from the existing rights and obligations of the original licensee. Thus, a partitionee or disaggregatee should be required to observe the same construction deadline as the original licensee with respect to the partitioned area or disaggregated frequencies. Similarly, partitionees and disaggregatees should receive as their license term the amount of time remaining on the original licensee's term prior to the subject transaction, and should be entitled to the same renewal expectancy with respect to the partitioned area or disaggregated spectrum as the original licensee would have been entitled to had it retained the area or frequencies. Finally, a partitionee or disaggregatee should be permitted to make a pro rata portion of the installment payments to the government to the extent that it qualifies as a small or very small business.

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To: The Commission		

**COMMENTS OF SMR ADVISORY GROUP, L.C.**

SMR Advisory Group, L.C. ("SMR Advisory"), by its counsel and pursuant to the provisions of Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its comments on the Fifth Notice of Proposed Rule Making ("Fifth Notice") in the captioned proceeding.<sup>1/</sup> The Fifth Notice considers whether to allow full partitioning or disaggregation in the 220 MHz services market.

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<sup>1/</sup> In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, FCC 97-57 (released March 12, 1997).

## I.

### INTRODUCTION

SMR Advisory manages some eighty-five (85) 220-222 MHz licensed systems, all of which have been constructed. In addition, SMR Advisory (or an affiliate thereof) intends to participate in the upcoming auction of Phase II 220 MHz licenses to supplement its existing network of Phase I 220 MHz systems. SMR Advisory has actively participated throughout this processing to assist the Commission in the formation of a regulatory framework which meets the FCC's expressed goals of improving efficiency in the licensing process, eliminating unnecessary regulatory burdens on both existing and future licensees, and enhancing the competitive potential of the 220 MHz Service in the mobile services marketplace.

In its most recent move to maximize the efficient use of the 220 MHz spectrum and to further other goals mandated by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Communications Act"), the Fifth Notice considers various issues regarding partitioning and disaggregation in the 220 MHz service. In particular, the Commission requests comment on, among other things, (i) whether to adopt partitioning and disaggregation for non-nationwide Phase I licensees; (ii) the manner in which partitioned area should be defined; (iii) whether to adopt minimum or maximum disaggregation standards; (iv) whether to permit combined partitioning and disaggregation; (v) what type of construction and licensing requirements should be applicable to partitionees and disaggregatees; and (vi) whether partitionees and disaggregatees that qualify as small or very small businesses should be permitted to pay their pro rata share of the remaining government obligation through installment payments.

The Commission's proposals with respect to partitioning and disaggregation in this proceeding follow similar actions either already taken or being taken in other services potentially competitive with the 220 MHz service, such as the broadband personal communications services, 800 MHz Specialized Mobile Radio service, paging service and 900 MHz SMR service.<sup>2</sup> Partitioning and disaggregation in these and the 220 MHz service will serve the public interest in a variety of ways: they will generally provide licensees with additional flexibility to tailor and implement their business strategies, they will increase competition in the marketplace by facilitating entry by new players, and they will expedite the provision of the service at issue to areas that may not otherwise receive that service in the near term. For these same reasons, SMR Advisory supports the adoption of full partitioning and disaggregation for Phase I and Phase 220 MHz licensees as discussed below.

## II.

### DISCUSSION

#### A. **Full Partitioning and Disaggregation Should Be Afforded Phase I As Well As Covered Phase II Licensees.**

In the Fifth Notice, the Commission tentatively concludes that it should not adopt partitioning for non-nationwide Phase I licensees on the grounds that such licenses are awarded

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<sup>2</sup> See, e.g., Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licenses, WT Docket No. 96-148, Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers, GN Docket No. 96-113, FCC 96-474 (released December 20, 1996)("Partitioning Report and Order"); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, 11 FCC Rcd 1463 (1995)("800 MHz NPRM"); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, FCC 97-59 (released February 24, 1997)("Paging Order"). See also American Mobile Telecommunications Association, Inc., Petition for Rulemaking to Expand Geographic Partitioning and Spectrum Disaggregation Provisions for 900 MHz SMR, Public Notice, DA 96-1654 (released October 4, 1996)("AMTA Petition")(the Commission also has incorporated the AMTA Petition into its consideration of the 800 MHz rulemaking proceeding).

on a "site specific basis" rather than for a geographic area.<sup>3/</sup> SMR Advisory strongly believes, however, that the Commission's goals will be better served by full partitioning for all Phase I non-nationwide licenses as well as covered Phase II licensees and Phase I nationwide licensees.<sup>4/</sup>

The Commission's intention to limit the rights of Phase I non-nationwide licensees to partition appears to be based at least in part on administrative concerns: that the partitioning of smaller areas would make it difficult for the Commission to track licensees for specific areas. In addition, the Commission appears to believe that the areas licensed to Phase I non-nationwide areas do not lend themselves to partitioning due to their smaller size when compared to the areas licensed to Phase II licensees. SMR Advisory believes that the Commission should allow the marketplace to determine whether an area is too small for effective partitioning. Many of the Phase I non-nationwide licensees have either consolidated Phase I licenses or combined with other Phase I licensees to form operational networks capable of competing with regional or even nationwide systems. To further this effort, throughout this proceeding, SMR Advisory and other commenters have urged the Commission to eliminate the restrictions contained in Section 90.739 of the Commission's Rules which currently forbid any single licensee from holding more than one Phase I license within a particular forty-mile area.<sup>5/</sup> Upon the elimination of that rule --

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<sup>3/</sup> Fifth Notice, at para. 322.

<sup>4/</sup> The Commission defines "covered Phase II licenses" as Phase II EA, Regional or Nationwide 220 MHz licenses; this definition excludes Phase II licenses that are authorized to use Public Safety or EMRS channels.

<sup>5/</sup> In response to this urging, on November 19, 1996, the Commission issued a Public Notice in which it requested comment on the elimination of Section 90.739 of the Rules. See Public Notice, "Commission seeks Supplemental Comment on Request to Eliminate 40-Mile Rule for 220 MHz Radio Service, FCC 96-448, released November 19, 1996. Comments were filed on an expedited basis on December 10, 1996.



which should occur within the next thirty days -- a single Phase I licensee would be permitted to aggregate Phase I licenses at a single location (i.e., increase the number of frequencies at a particular location from 5 channels to 10, 20, 30 or more). If a Phase I non-nationwide licensee also were to acquire Phase I licenses covering multiple "site specific" areas, the total area and frequencies held by a single Phase I non-nationwide licensee could rival the area and frequencies held by a covered Phase II licensee.<sup>6/</sup> In such cases, these Phase I non-nationwide licensees would be situated similar to covered Phase II licensees with respect to their ability to further the Commission's mandate under Section 257 of the Communications Act to eliminate entry barriers into the telecommunications market for small businesses, and to promote economic opportunity for a wider variety of applicants consistent with Section 309(j) of the Communications Act.

In addition, as a simple matter of competitive system operation, non-nationwide Phase I licensees must receive the same flexibility that is afforded to covered Phase II licensees and nationwide Phase I licensees with respect to both partitioning and disaggregation. While it is true that the "site specific" Phase I licenses cover considerably less area than the Economic Area, Regional Areas or Nationwide areas associated with the covered Phase II licenses and that the number of frequencies allocated to a Phase II license generally is less than the frequencies assigned to covered Phase II licensees,<sup>7/</sup> the Commission has afforded no compelling reason for withholding from the non-nationwide Phase I licensees the flexibility to be gained from full

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<sup>6/</sup> The factual circumstances of each Phase I licensee is likely to differ significantly. To the extent that a particular Phase I licensee serves only the area covered by its "site specific" license with a total of five (5) channels, there is not likely to an economic incentive for that licensee to partition or disaggregate its license.

<sup>7/</sup> Phase I licensees hold 5 channel trunked licenses; Phase II licensees generally hold frequencies of 10 or 15 channels per license.

partitioning and disaggregation. Indeed, if Phase I licensees are not afforded comparable rights with respect to partitioning and disaggregation, they will almost certainly be harmed in their ability to compete in the marketplace. Phase I non-nationwide licenses would be deprived of a significant vehicle for tailoring their service area which would be available to Phase II licensees, as well as to virtually every other potentially competitive service provider. Such inequality clearly contravenes the Commission interest in promoting competition both within and without the 220 MHz service.

Moreover, a Phase I non-nationwide licensee planning to participate in the upcoming 220 MHz Phase II auction would be placed at a distinct disadvantage vis a vis other bidders in the auction if it is not afforded the same level of flexibility with regard to its Phase I licenses as it will receive for its Phase II licenses. There may be significant business advantages in being able to partition portions of a licensed area to another licensee for example, in exchange for portions of that licensee's area which better serve the business needs of both licensees. Similarly, the ability to disaggregate one or more frequencies enables a 220 MHz licensee -- whether Phase I or Phase II -- to more flexibly tailor its proposed system(s) to the needs of the area being served.

**B.     The Commission Should Allow Partitioning of 220 MHz  
Licenses Along Any Service Area Defined By The Parties.**

For those licensees permitted to partition their licenses, the Fifth Notice proposes a flexible approach to defining the partitioned areas based on the service area defined by the parties. SMR Advisory supports this more flexible approach as better serving the needs of all parties involved. The Commission has considered and rejected more rigid definitions of service areas in other proceedings, ultimately concluding that partitioning based on various geopolitical

boundaries may not be reflective of market realities and may inhibit partitioning in instances where a partitionee desires to serve a niche market which does not precisely match an area defined in such a manner.<sup>8/</sup>

There is no reason why partitioning in the 220 MHz service should be treated any differently. SMR Advisory is aware of no technical or other issues unique to the 220 MHz service that might impede the adoption of the proposed “self-definition” approach set out in the Fifth Notice. Indeed, the same factors favoring full flexibility in the PCS proceeding clearly are present in this proceeding as well. Like broadband PCS license areas, the geographic areas being licensed by the Commission for Phase II 220 licenses generally fall into local, regional and nationwide categories.<sup>9/</sup> The Commission’s adoption of more flexible rules governing the type of services offered in the 220 MHz service, such as fixed services, also is more likely to result in “niche” areas covering a specific area which may not be consistent with geopolitical boundaries.<sup>10/</sup> For these reasons, SMR Advisory urges the Commission to adopt its proposed approach and permit parties to define the service areas to be partitioned.

**C. The Commission Should Not Impose Any Minimum or Maximum Disaggregation Standards.**

The Commission requests comment on whether minimum or maximum disaggregation standards should be adopted to enable the Commission to “track” disaggregated spectrum and

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<sup>8/</sup> See, e.g., Partitioning Report and Order, para. 23 (rejecting the definition of service areas along county lines for broadband PCS licenses).

<sup>9/</sup> As earlier indicated, Phase I Licensees also may hold multiple authorizations which together cover a wide geographical area.

<sup>10/</sup> A 220 MHz partitionee, for example, may wish to provide fixed services to a particular building or cluster of buildings located outside the general area targeted by the existing 220 MHz operator.

review disaggregation proposals in an expeditious fashion. See Fifth Notice, para. 326. SMR Advisory urges the Commission to refrain from imposing any such limitations. Although it is unlikely that amounts of spectrum as small as a single kHz channel pair could easily be disaggregated, to the extent that it is not, the marketplace will impose its own pressures against disaggregation under such circumstances. Moreover, it may make sense in some instances for a potential disaggregatee to obtain spectrum from more than one licensee. The total amount of disaggregated spectrum obtained from each licensee might appear to be too small to be viable; when combined with amounts obtained from other licensees, however, the total amount of disaggregated spectrum employed may be completely appropriate.

There also may be instances where the ability to disaggregate varying amounts of spectrum would be useful to Phase I and Phase II licensees in their dealings with each other. One licensee with more spectrum than it needs in one area, for example, may "trade" for additional spectrum in another area. As a result, the 220 MHz system of each licensee would be better tailored to the market base being served. For these reasons, SMR Advisory urges the Commission to permit disaggregation to occur without restrictions of any kind.

**D.     The Commission Should Permit Combined Partitioning and Disaggregation In The 220 MHz Service.**

The Commission next asks whether combined partitioning and disaggregation should be permitted in the 220 MHz service. See Fifth Notice, para. 327. Under this scenario, a particular Phase II licensee holding a 15 channel regional license, for example, might permit a third party entity to serve a particular local area with 5 of the 25 channels, with the Phase II licensee retaining ten channels for its own use in the partitioned area. The Commission tentatively concludes in this regard that it should permit such combinations "in order to provide parties the

flexibility they need to respond to market forces and demands for service relevant to their particular locations and service offerings.” Fifth Notice, para. 327. SMR Advisory agrees with the Commission’s conclusions on combination partitioning and disaggregation and fully supports the Commission’s proposals in this regard.

**E. The Construction and Licensing and Payment Obligations and Entitlements For Partitionees and Disaggregates Should Track the Rights and Obligations of the Original Licensee.**

The Fifth Notice requests comment on several issues relating to the construction and licensing requirements applicable to partitionees and disaggregates. First, with regard to construction requirements, the Commission asks whether it should establish dual construction options for Phase II licensees and partitionees similar to those adopted in the Partitioning Report and Order. In that proceeding, the parties were afforded the flexibility of allocating the responsibility for constructing the license areas by selecting one of the following two options: (i) each of the original licensee and the partitionee is responsible for its own area; or (ii) the original licensee retains the responsibility for meeting the construction requirement for the entire market, with the partitionee then subject only to a less rigorous “substantial service” requirement.<sup>11/</sup> Under the first option, to the extent that either party fails to meet its construction requirements, both parties licenses will be subject to forfeiture. Conversely, if the original licensee fails to meet the construction requirement under the second option, only the original licensee is subject to forfeiture.<sup>12/</sup>

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<sup>11/</sup> See Partitioning Report and Order, para. 42.

<sup>12/</sup> Id. at para. 62.

As a general matter, SMR Advisory believes that the partitionee should be subject to the same obligations and entitled to the same rights as the original licensee. Thus, to the extent that a partitionee acquires a partitioned area from a licensee with two years remaining on a construction obligation, the partitionee should be subject to a two year construction obligation with respect to its partitioned area. SMR Advisory opposes any rule, however, that would condition any license received from an original licensee pursuant to partitioning or disaggregation upon the performance (or nonperformance) of the original licensee. Any such restriction would surely discourage partitioning and disaggregation by creating uncertainty as to the continued validity of an acquired license.<sup>13/</sup>

Similarly, all partitionees and disaggregates should receive licenses with the same license terms (on a pro rata basis) granted the original licensees. To the extent a partitionee acquires a partitioned area from a licensee with three years remaining on its license, for example, the partitionee should receive a three year license term for the partitioned area. The partitionee should not receive a new ten year license term since such a conveyance would exceed the rights of the original licensee. Because the original licensee is entitled to a renewal expectancy upon the expiration of its license term, however, the partitionee/disaggregatee should be entitled to the same renewal expectancy upon the expiration of its partitioned/disaggregated license.

In another application of this general principal, Phase II 220 MHz partitionees or disaggregatees should be permitted to assume the "partitioned" or "disaggregated" portion of the

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<sup>13/</sup> The Commission notes, with respect to Phase I licenses, that no disaggregation should be allowed until the original licensee has met its construction deadline. As the construction deadline has passed for virtually all Phase I licensees (with certain limited exceptions, such as Canada/Line A licensees and licensees with pending modifications), this requirement would seem to be moot and unnecessary.

original licensees' financial obligation to the Commission, including the right to make those payments on an installment basis to the extent that the partitionees/disaggregates qualify as a small or very small business.<sup>14/</sup> In calculating the allocation of the remaining government obligation between the parties, SMR Advisory supports the use of population as the objective measure for calculating the relative value of the partitioned area and the amount of spectrum disaggregated as the objective measure for disaggregation.

### III.

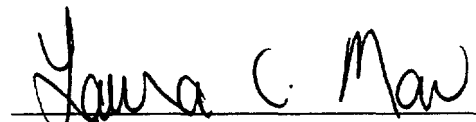
### CONCLUSION

Based on the foregoing, SMR Advisory urges the Commission to consider these comments and act in a manner consistent with the suggestions made herein.

Respectfully submitted,

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<sup>14/</sup> With respect to the processing of these transactions, SMR Advisory supports the Commission's proposal to utilize partial assignment procedures to review 220 MHz partitioning and disaggregation transactions.